BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONALD R. SPENCER	)	
Claimant	)	
	)	
VS.	)	
	)	
MILLARD REFRIGERATED SRVS. INC.	)	
Respondent	)	Docket No. 264,573 &
	)	264,574
AND	)	
	)	
SENTRY INSURANCE A MUTUAL CO.	)	
Insurance Carrier	)	

ORDER

Respondent and claimant requested review of the August 16, 2004 Award by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on November 9, 2004.

APPEARANCES

Mark E. Kolich of Lenexa, Kansas, appeared for the claimant. Christopher J. Carpenter of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. Claimant alleged an injury on November 27, 2000 (Docket No. 264,574) and a series of injuries through March 13, 2001 (Docket No. 264,573). The parties filed a stipulation that any impairment/disability suffered by claimant results from the November 27, 2000 date of accident. The parties further stipulated that on November 27, 2000, the claimant's average gross weekly wage was $561.89.

ISSUES

The Administrative Law Judge (ALJ) determined the claimant sustained a 28 percent permanent partial work disability based upon a 47 percent task loss and an 11 percent wage loss.

The respondent requests review and argues claimant is limited to his functional impairment because at the time of the regular hearing claimant had returned to work at a comparable wage. Respondent argues that because claimant is currently engaging in work earning wages equal to 90 percent or more of his pre-injury average gross weekly wage he is limited to compensation for his functional impairment. Consequently, respondent contends the claimant's functional impairment should be based upon Dr. Theodore L. Sandow's 5 percent rating to the body as a whole.

Claimant requests review and concedes he began making a wage equal to 90 percent of his pre-injury wage on February 21, 2004. But claimant argues that he suffered a substantial wage loss from the time his job with respondent was terminated until February 21, 2004. Claimant argues he is entitled to a work disability during the intervening time period before he began making a wage equal to 90 percent of his pre-injury average gross weekly wage. Claimant further argues that equal weight should be given to both physicians' task loss opinions which would increase his task loss to 68.5 percent. Consequently, claimant requests a work disability for 168.43 weeks which represents the number of weeks from the date of accident through the date he began making a comparable wage.

The sole issue for Board review is the nature and extent of claimant's disability, specifically, whether claimant is entitled to compensation for a work disability for the time period before he began making a wage equal to 90 percent of his pre-injury wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was injured on November 27, 2000, when the forklift he was operating slid back into some racks jarring his low back. The claimant finished working that day but the following morning his back pain caused claimant to seek emergency room treatment. Claimant was provided pain medications which provided some relief. On November 29, 2000, the claimant returned to work and was sent for treatment with the company physician. The claimant was provided medical treatment consisting of medications and physical therapy. Apparently, the company physician released claimant from treatment in December 2000.

Claimant continued working as he was receiving treatment. As claimant continued performing his normal job duties his back condition worsened and he sought additional treatment with his family physician who referred claimant to Dr. Copeland, a neurosurgeon.

An MRI performed April 9, 2001, on claimant's lumbar spine revealed moderate central canal and mild neuroforaminal stenosis at L3-4, mild to moderate central canal and neuroforaminal stenosis at L4-5, moderate stenosis of the right neuroformina and mild stenosis of the left neuroforamina without significant stenosis upon the central canal at the L5-S1 level, and diffuse facet arthropathy. EMG testing was interpreted as showing findings most consistent with peripheral neuropathy, primarily axonal and affecting motor and sensory fibers. On March 1, 2001, a CT scan of claimant's lumbar spine was interpreted to demonstrate moderate stenosis at L3-4 with possible spondylolysis at L4 with a Grade 1 spondylolisthesis of L4 on L5.

Dr. Copeland discussed treatment options including surgery or an IDET procedure. However, the chances that surgery would be successful were reduced because of claimant's weight and the fact that he was a smoker. Consequently, claimant declined surgery. Dr. Copeland imposed restrictions against lifting more than 15 pounds and to avoid bending, twisting, unstraight posture and sitting for long periods of time.

When claimant provided the restrictions to respondent his employment was terminated on March 13, 2001. Claimant testified that he was told he was "either going to be a hundred percent fit or I had no job."[1]

At claimant's attorney's request, the claimant was examined by Dr. P. Brent Koprivica on August 4, 2001. The doctor reviewed claimant's medical records and performed a physical examination of the claimant. The doctor diagnosed claimant with multi-level symptomatic lumbar spinal stenosis. The doctor defined spinal stenosis as a narrowing of the spinal canal and noted that because there is a decrease in the flexion of the canal where the spinal cord nerves are in the central nervous system in the spine the condition produces a dysfunction in compression and that can produce neurologic symptoms, chronic pain, and limitation of a person's ability to bend.

Dr. Koprivica opined claimant suffered a 20 percent permanent partial whole person functional impairment based upon DRE Lumbosacral Category IV. The doctor explained his rating in the following manner:

> Q. (Interrupting) What is the DRE?
>
> A. Diagnosis Related Estimate. That's under the injury model, that's which category are you going to put him in. They call them DRE Categories.
>
> Category II is a mild impairment and it's a 5 percent.
>
> Category III is for radiculopathy which assigns a 10 percent.

---

[1] R.H. Trans. at 19.

Category 4 is for loss of motion segment which assigns a 20 percent in general.

Now, if you look at Mr. Spencer's situation he has multi-level disease. He has symptomatic lumbar spinal stenosis which is a condition that they're considering doing a decompression diskectomy and fusion at more than one level. Very serious structural problem, very serious surgery that is being contemplated.

I have also restricted him based on that condition severely where his restrictions was occasional lifting or carrying up to 20 pounds with avoidance of frequent or constant bending at the waist, pushing, pulling or twisting and avoiding sustained or awkward posture of the low back.

If you talk about those restrictions being necessitated by that type of a severe structural problem then you look at those relative percentages of 5, 10, 20 percent. In my mind the 5-and-10 percent are too low. At least that was what my clinical impression was.

Because the DRE Impairment Category only looks at one level of the spinal abnormality and he has multiple levels and looking at the surgical intervention that is being recommended the Guides outline that the range of motion model can be used as a differentiator.

The way the method is supposed to be used is that you assign your number under the range of motion model. You compare that to the injury model and the closest DRE Impairment Category is the one you choose to assign to the impairment.

You still use the injury model but you use the category closest to what your percentage would be under the range of motion model.

When I did the range of motion model the determination in his case, he calculated out to 19 percent impairment. I did not assign any impairment under the range of motion model for the numbness complaints he had because I thought that was a different process. He has a problem with a peripheral neuropathy, so I didn't consider that.

But even without considering that he comes out at a 19 percent, but when you go back to the injury model it's closest to Category 4 which is 20 percent and the Guides say based on that -- using that as a differentiator that would be the appropriate Category to assign.

When I look at it clinically do I think 5 is more representative of this injury, a 10 percent or 20, I think 20 percent is more representative, so it all fits together in utilizing the Guides is justified.

That's the reason why I assigned a 20 percent whole person impairment.[2]

Dr. Koprivica imposed restrictions of occasional lifting or carrying of 20 pounds; claimant should avoid frequent or constant bending at the waist or pushing, pulling or twisting; claimant should avoid sustained or awkward postures of the lumbar spine; claimant should sit for no longer than one hour and standing and walking should be limited to 30 minute intervals and claimant should avoid climbing activities. Finally, Dr. Koprivica reviewed a list of tasks prepared by vocational expert Mary Titterington. Ms. Titterington met with claimant and prepared a list of the tasks claimant had performed in the 15 years before the accident. Dr. Koprivica concluded claimant could no longer perform 9 of the 10 tasks which represents a 90 percent task loss.

At respondent's request, the claimant was examined by Dr. Theodore L. Sandow, Jr. on March 12, 2002. Dr. Sandow reviewed claimant's medical records and performed a physical examination of claimant. The doctor concluded claimant suffered a 5 percent permanent partial whole person functional impairment based upon DRE Thoracolumbarl Category II. The doctor explained his rating in the following manner:

> Q. Okay. And based upon your review of the records and the diagnostic testing and your examination of Mr. Spencer, were you able to determine a DRE category within which you placed Mr. Spencer?
>
> A. Yes, I did.
>
> Q. Okay. And could you tell the Court which category that was?
>
> A. It appeared to me that Mr. Spencer most closely fell into the DRE thoracal [sic] lumbar Category 2.
>
> Q. Okay. And can you tell the Court why?
>
> A. There was no significant loss of motion segment and the radiculopathy was not verified by EMG or any wasting, muscle wasting or other specific loss of reflexes. Mr. Spencer, I could not elicit any of his reflexes in his lower extremities. This generally just states that that's how the patient is and that it's not due to neurologic damage or pressure or what have you, and that's the reason that I felt he most closely fit into the DRE category.
>
> Q. What would be the reason that you would feel he would not fit into a DRE Category 3 or a Category 4?

---

[2] Koprivica Depo. at 15-18.

> A. With a Category 3, you must have significant neurologic findings. That means, like, unilateral loss of a reflex, Achilles and/or patellar, or having significant atrophy such as if you had involvement of the L5 nerve root, you frequently can develop a drop foot, which leads to atrophy of the tibialis anterior and the extensor taluses longus. So he didn't seem to fall into 3. On Category 4 is a combination of 3 and 4 and the additional things above what you find in Category 3 is that there's a loss of motion segment or a translation of one vertebra upon another, and it has to be a certain measurement. I did not actually measure these for slippage, but generally anterior spondylolisthesis of L4 in an individual of Mr. Spencer's age is not very significant. It can be seen on x-ray, but it's not a marked thing. It's not what we term a Grade 3 or Grade 4 where half or more of the body of the vertebra is slid. It's generally a Grade 1 or less. Grade 1 is usually a quarter of the body width of the vertebra.[3]

Dr. Sandow imposed permanent restrictions of no repetitive bending, stooping, twisting or lifting over 35 pounds. Finally, Dr. Sandow reviewed a list of tasks prepared by vocational expert Michael J. Dreiling. Mr. Dreiling met with claimant and prepared a list of the tasks claimant had performed in the 15 years before the accident. Dr. Sandow reviewed Mr. Dreiling's task list and concluded claimant suffered a 47 percent task loss.

After claimant's job with respondent was terminated he found work as a security guard with Command Security earning $9.50 an hour in May 2001. On May 2, 2002, claimant went to work for Guardsmark Security performing security work earning $9.10 an hour. On February 21, 2004, claimant went to work for Securitas performing security work earning 90 percent of his pre-injury average gross weekly wage.

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the AMA *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.[4]

The Board finds that claimant's functional impairment falls somewhere between Dr. Sandow's 5 percent and Dr. Koprivica's 20 percent. Consequently, the Board finds it appropriate in this case to give equal weight to these opinions which results in a 13 percent functional impairment.

The primary issue raised by respondent is whether claimant's compensation should be limited to his functional impairment percentage. Respondent argues that at the time of the regular hearing the claimant agreed that he was employed at a wage equal to 90

---

[3] Sandow Depo. at 9-11.

[4] K.S.A. 44-510e(a).

percent of his pre-injury wage. Because claimant currently "is engaging" in such employment the respondent argues he is limited to his functional impairment.

The Board disagrees with respondent's analysis because it does not account for the intervening time period after the accident when claimant was not earning 90 percent of his pre-injury wage. As demonstrated by this case, there are frequently periods of time when the percentage of a claimant's disability changes.

Such a change may occur from review and modification or as a part of the initial award when, for example, the claimant ceases to work or returns to work after being off for a period. The award may change from functional to work disability or vice versa. The wage prong of the work disability test and consequently the percentage of work disability may change.

But the amount of benefit does not change whether the benefits are for work disability or functional impairment, instead when the injured worker's status changes from work disability to functional impairment the only change under the current statute is the length of time the employee is entitled to receive benefits.

The award is calculated or recalculated based upon the various disability rates. Stated another way, the method is to calculate the award, or recalculate the award if benefits have already been paid or are payable based upon on a different disability rating, using the new or latest disability rate as though no permanent partial benefits had been paid or were payable under any earlier disability rate. The award so calculated gives the total number of weeks and amounts payable for the award. If permanent partial benefits have previously been paid or are payable based on a different rate of disability, respondent is entitled to a credit for those payments. If the rating goes down, as when the claimant returns to work after being off for a period of time, and the new calculation on the new rating results in fewer weeks than respondent has previously paid or are due, respondent owes nothing more. If the disability rate goes up, as when the claimant is laid off, the new work disability rating is calculated based on 415 weeks (less deduction for temporary total paid over 15 weeks) and the number of weeks of permanent partial benefits paid or payable based on the lower rating is credited against amounts due. The last disability rating or amounts already paid or payable, if higher, become the ceiling on benefits awarded. This method of computation was affirmed by the Kansas Court of Appeals in *Wheeler*[5].

Respondent's contention that only the last disability rating is controlling would ignore interim changes that might occur, such as demonstrated by this claim. Simply stated, after

---

[5] *Wheeler v. Boeing Co.*, 25 Kan. App. 2d 632, 967 P.2d 800 (1998), *rev. denied* 266 Kan. 1116 (1999).

every change in the percentage of disability, a new calculation is required to determine if additional disability weeks are payable. If so, the claimant is entitled to payment of those additional disability weeks until fully paid or modified by a later change in the percentage of disability.

The evidence established that after claimant was terminated from his employment with respondent because his restrictions could not be accommodated, he searched for and finally obtained work as a security guard. While looking for work and even after he obtained employment the claimant was not earning 90 percent of his pre-injury wage. Accordingly, claimant was entitled to a work disability.

Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** (Emphasis added.)

The physicians' task loss opinions ranged from 47 to 90 percent. The Board discerns no persuasive reason to afford more weight to either opinion in this instance and, accordingly, concludes claimant has suffered a 68.5 percent task loss.

The evidence further establishes that claimant would be entitled to his 13 percent functional impairment from the November 27, 2000 date of accident through his termination from employment on March 13, 2001. From that date until he obtained his first security guard position claimant would be entitled to a 84 percent work disability based upon a 100 percent wage loss and a 68.5 percent task loss. Beginning May 2001 claimant's work disability decreased to 44 percent based upon a 19 percent wage loss and a 68.5 percent task loss. This work disability would remain until February 21, 2004, when claimant began earning 90 percent of his pre-injury wage at which time he would again only be entitled to his 13 percent functional impairment.

The Board is not unmindful that in May 2002 the claimant changed employers and his wage decreased slightly which would ordinarily increase his wage loss percentage. However, because claimant voluntarily changed to a slightly lower paying job there is some question regarding whether such a change demonstrated good faith. The Board will

impute the previous wage which claimant remained capable of earning had he not decided to change employers. In his brief to the Board, the claimant did not allege an increased work disability percentage as a result of this last change in wages and in any event another change of the wage loss percentage would not change the total compensation awarded because when claimant started making a wage equal to 90 percent of his pre-injury average gross weekly wage he was not entitled to additional compensation from that date forward.

As previously noted, the Board's calculation method requires for each change in the percentage of disability the award is recalculated as if the new percentage was the original award, thereafter the number of disability weeks is reduced by the prior permanent partial disability weeks already paid or due.

Initially, a payment rate must be determined, which in this case is calculated by multiplying the stipulated $561.89 average gross weekly wage by .6667.[6] Such calculation computes to a payment rate of $374.61.

The next step is to determine the number of disability weeks payable by subtracting from 415 weeks the total number of weeks temporary total disability compensation was paid, except that the first 15 weeks of temporary total disability compensation is excluded. The remainder is then multiplied by the percentage of permanent partial general disability.[7] In this case, the claimant never received any temporary total disability compensation. Accordingly, there would be 415 disability weeks payable which are then multiplied by the percentage of permanent partial general disability.

Herein, the claimant continued working for respondent at his regular pay rate until March 13, 2001. Consequently, his initial percentage of permanent partial general disability would be limited to his 13 percent functional impairment.

Starting with the claimant's initial award based upon a 13 percent functional impairment, the calculation would require 415 weeks to be multiplied by the 13 percent permanent partial disability.[8] Such calculation results in 53.95 disability weeks payable.

The same calculation is made for each subsequent change in the claimant's disability with the additional step of deducting the prior permanent partial disability weeks already paid or due from the total disability weeks payable as determined by each new calculation.

---

[6] K.S.A. 44-510e(a)(1).

[7] K.S.A. 44-510e(a)(2).

[8] There are no weeks of temporary total disability compensation to deduct.

When claimant was terminated from his job with respondent on March 13, 2001, his disability increased to an 84 percent work disability. Accordingly, a new calculation requiring 415 weeks to be multiplied by the 84 percent permanent partial disability was necessary. Such calculation results in 348.6 disability weeks payable for the 84 percent work disability. But claimant was already due 15.29 disability weeks. Deduction of those weeks results in 333.31 additional disability weeks payable.

When claimant obtained employment on May 1, 2001, his work disability decreased to 44 percent. Accordingly, a new calculation requiring 415 weeks to be multiplied by the 44 percent permanent partial disability was necessary. Such calculation results in 182.6 disability weeks payable for the 44 percent work disability. But claimant was already due 22.29 disability weeks. Deduction of those weeks results in 160.31 additional disability weeks payable.

Finally, on February 21, 2004, claimant began earning a wage equal to 90 percent of his pre-injury average gross weekly wage. Consequently, his percentage of impairment was limited to his 13 percent functional impairment.

Accordingly, a new calculation requiring 415 weeks to be multiplied by the 13 percent functional impairment was necessary. Such calculation results in 53.95 disability weeks payable for the 13 percent functional disability. But claimant had already been paid for 168.86 disability weeks. Because claimant was already due more permanent partial disability weeks than that new sum, the claimant was not entitled to additional compensation from that date forward unless his circumstances again changed such that his percentage of disability was again modified to provide additional weeks of disability compensation.

Consequently, the Board modifies the ALJ's Award in accordance with the foregoing and finds claimant is entitled to 168.86 disability weeks payable at the disability rate of $374.61 for a total award of $63,256.65.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated August 16, 2004, is modified.

The claimant is entitled to 15.29 weeks of permanent partial disability compensation at the rate of $374.61 per week or $5,727.79 for a 13 percent functional disability followed by 7 weeks of permanent partial disability compensation at the rate of $374.61 per week or $2,622.27 for a 84 percent work disability followed by 146.57 weeks of permanent partial disability compensation at the rate of $374.61 per week or $54,906.59 for a 44 percent

work disability, making a total award of $63,256.65 which is due and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of November 2004.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Christopher J. Carpenter, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director